issue determined does not foreclose an agency from once again performing the function entrusted to it, i.e., determining a set of facts and reaching conclusions according to the appropriate standards. To be distinguished is the situation where the sole error by the agency is its failure to accept as a fact that which is required by the evidence.

C. The Instant Case.

The proceeding before the Interstate Commerce Commission commenced by the appellee essentially was of an adversary nature. The Commission sat in a judicial capacity to decide, on the record made by the parties only, whether the rail rates were unduly preferential and prejudicial as between the complainant and its competing shippers. As a matter of evidentiary procedure, the appellee presented a *prima facie* case for relief from a section 3(1) violation, by showing that it was subject to a higher rate for a shorter haul, and the burden was upon the appellant railroads and intervening shippers to prove, as a matter of defense, that there existed water carrier competition justifying the lower California-Pacific Northwest rail rates. *Atchison, Topeka and Santa Fe Ry. Co. v. U.S.*, 218 F. Supp. 359 (D.C. Ill. 1963) and *Mississippi Cotton Seed Crushers Association v. A. B. and C. Ry. Co.*, 238 I.C.C. 87, aff'd. 251 I.C.C. 643 (1942). On this basic issue, an extensive agency hearing was held and a large record compiled. The only serious question on the review to the District Court was whether the Commission properly sustained the railroads and intervening shippers in their defense of a water-compelled rate.

The District Court appropriately characterized the ap-

pellants' attempt to prove their asserted defense when it stated: "The intercoastal movement by which the rate disparity is sought to be justified is based upon a phantom fleet operating to non-existent terminals at illusory costs."

The effect of the review by the District Court was that it resolved that the appellants had not established their affirmative defense by failing to justify the lower California rate; thus, the appellee had presented a case entitling it to relief. There were no conclusions by the District Court that the Commission erroneously admitted or excluded evidence, made conclusions unsupported by adequate findings or that it applied any incorrect legal principle to the facts. In short, the only conclusion was that the record, to which all parties had full opportunity to contribute, did not support the findings necessary to appellants' asserted defense. Instead, the record overwhelmingly displayed the absence of a water-compelled lower California rail rate. With this in mind, the District Court formulated its remand so that the appellee could obtain from the Commission relief to which it was entitled initially.

III. The Cases Relied Upon by Appellants Are Inapposite

Appellants place reliance upon four cases which are to be distinguished from the case at hand.

Federal Power Commission v. Idaho Power Commission, 344 U.S. 17 (1952) involved an application to the agency for a license to maintain a hydro-electric project. The agency granted the license on certain specified conditions. On appeal, the Court of Appeals properly held

that the agency was without authority to attach the specified conditions. It then ordered that the cause be remanded to the agency "for the entry of an order in accordance with the opinion of this court." Upon a request by the agency for a clarification of the Court's order, a new judgment was entered by the Court of Appeals specifically affirming the agency's original order but modifying it by striking the specified conditions. The Supreme Court held that the Court of Appeal's second judgment was improper in that it usurped the administrative function. The Court stated that the first order of remand was proper in that the agency could have either granted the license or it could have decided that, in the public interest, the license should not be granted in view of the factors which were the basis for the originally specified conditions. Here, after the review, there was clearly something more for the agency to do in the way of deciding the merits of the original application. Furthermore, it is very significant that the proceeding was not in the nature of an adversary proceeding, but rather was an *ex parte* application to the agency, whose duty it was to decide the matter on the basis of broad public policy. The case is not authority for restricting a court's remand powers in all agency-review situations.

In *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134 (1940), there was involved, as in the *Idaho Power Company* case, an *ex parte* application for a license to do business, i.e., to operate a broadcasting station. The Commission denied the application. On appeal, the Court of Appeals reversed, holding that one of the Commission's conclusions was based upon a misunderstanding of law, and the Court,

remanded to the ". . . . Commission for reconsideration in accordance with the views expressed." On remand, the Commission sought to reconsider Pottsville's application along with others and on a comparative basis. Pottsville then obtained a Writ of Mandamus from the Court of Appeals requiring the Commission to reconsider the application of Pottsville on the basis of the record as originally made before the agency. The Commission appealed, and the Supreme Court dissolved the Writ of Mandamus, holding that the Court of Appeals' interpretation of the scope of its own mandate was not necessarily conclusive. The Supreme Court then discussed, at length, the nature of review of the administrative action and concluded that in view of the nature of the agency proceeding involved, once the court corrected the error, the agency again could reconsider on a new record. Here, it is submitted the Court's decision is properly to be understood by the non-adversary nature of the agency proceeding in which the Commission was bound to "enforce the legislative policy committed to its charge."

Securities Exchange Commission v. Chenery, 322 U.S. 194 (1947), and *Konigsberg v. California State Bar*, 366 U.S. 36 (1961), involved situations where agencies erred in the first instance by not determining the facts according to the proper rationale or standards. Upon remand, the agencies once again were free to consider the whole record in light of the appropriate standards.

IV. CONCLUSION

It is earnestly submitted that the nature of the instant proceeding permitted the District Court to remand the case to the Commission in a manner whereby further

agency action was limited to formulating the precise nature of relief to be granted the appellee. Under the circumstances, to give force to the administrative procedure act, Title 5 U.S.C.A. 1009(e), which states that a reviewing court ". . . shall (A) compel agency action unlawfully withheld or unreasonably delayed; . . .", the District Court lawfully could limit the remand to the record before the Commission at the time of its previous decision and order. As stated by Professor Louis L. Jaffe, of Harvard Law School, in his treatise *Judicial Control of Administrative Action*, (1965, Little, Brown and Company), the preclusion of further opening or reconsideration of factual issues by an agency may be desirable to (1) permit a terminal point for litigation; (2) protect reliance on what appears to have been decided; and (3) prevent vexatious and issue-by-issue litigation. All of these values were served when the District Court clarified its remand by the Amended Judgment now questioned by the appellants. The appellee respectfully requests the Court affirm the District Court's final order.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966

No. 526

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION;

and

GREAT NORTHERN RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; SPOKANE INTERNATIONAL RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; SOUTHERN PACIFIC COMPANY; AMERICAN POTASH & CHEMICAL CORPORATION; and STAUFFER CHEMICAL COMPANY,

Appellants,

v.

SASKATCHEWAN MINERALS (SODIUM SULPHATE DIVISION), a Crown Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

OPPOSITION TO MOTION TO AFFIRM
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